MOHAMED TAUFIK v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Hamid J.) September 9, 1974]
[Kuala Lumpur — Selangor Criminal Appeal No. 55 of 1973]

Bribery and Corruption — Whether necessary to prove that favour to be shown is in relation to principal's affairs — Money paid to police officer — No proof of commission of offence by complainant — Whether facts adduced support charge of extortion — Whether complainant an accomplice — Burden of proof — Evidence in rebuttal — Sentence — Excessive — Prevention of Corruption Act, 1961, ss. 4(a), 6(1) and 18.

This was an appeal against the conviction of the appellant on two charges of corruption. The main grounds of appeal were:

(1) that the learned President made no finding that the complainant was an accomplice and did not warn himself of the danger of convicting the appellant on the uncorroborated evidence of the complainant;

(2) that the facts showed that this was a straightforward case of extortion;

(3) that the learned President failed to recognise that the appellant was not acting in relation to the affairs of his principal by representing to the complainant that he had committed an offence against the law because the complainant had in fact not committed any offence.

Held: (1) in this case the complainant had not taken any active part in the transaction and was therefore not an accomplice; in any event in view of the provisions of section 18 of the Prevention of Corruption Act, 1961, the complainant could not be presumed to be unworthy of credit;

(2) on the facts this was clearly not a case of extortion, as there was no threat and the appellant had solicited and received the bribes in return for a favour namely to refrain from taking action against the complainant;

(3) in view of section 6(1) of the Prevention of Corruption Act, 1961 there were no necessity for the prosecution to prove that the person who gave the bribe had committed an offence or that the favour sought was in relation to the principal's affairs;

(4) in the circumstances of the case, the sentence of two and a half years' imprisonment was excessive and should be reduced to one year.

Cases referred to:-

(1) *Abdul Hamid bin Mohamad* v. *Public Prosecutor* [1953] M.L.J. 26.

(2) *Loh Kwang Seng* v. *Public Prosecutor* [1960] M.L.J. 271.

(3) *Vincent Koh & Anor.* v. *Public Prosecutor* [1965] 2 M.L.J. 270.

(4) *Public Prosecutor* v. *Yuvraj* [1969] 2 M.L.J. 89.

(5) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.

(6) *Attan bin Abdul Gani* v. *Public Prosecutor* [1970] 2 M.L.J. 143 at p. 145.

CRIMINAL APPEAL.

Datuk Balwant Singh for the appellant.

Shaik Daud bin Mohamad Ismail and *T. S. Sambathamurthy* (Deputy Public Prosecutor) for the respondent.

Abdul Hamid J.: This is an appeal against conviction and sentence of the appellant, a probationary inspector of the Royal Malaysian Police, on two charges under section 4(a) of the Prevention of Corruption Act, 1961 for corruptly obtaining from one Wong Bok Yin alias Wong Yin for himself a gratification of cash $500 and $490 as an inducement for forbearing to do an act in relation to his principal's affairs, to wit, to refrain from taking action against the said Wong Bok Yin for being in possession of goods which were alleged to be imitation goods.

There are numerous grounds of appeal but most of them have been abandoned by Datuk Balwant Singh counsel for the appellant. The main grounds are —

(1) that the learned President made no finding that the complainant (PW1) was an accomplice, and, if the complainant was an accomplice, the learned President ought to have warned himself of the danger of convicting the appellant on the complainant's uncorroborated evidence;

(2) that the learned President failed to recognize, on the facts adduced by the prosecution, even if believed, that it was a simple straightforward case of extortion and the appellant ought to have been charged under section 383 of the Penal Code;

(3) that the learned President failed to recognize that the appellant was not acting in relation to the affairs of his principal by representing to the complainant that he committed an offence against the law because the complainant had committed no offence and the conviction on the charge of corruption was therefore wrong in law; and

(4) that the learned President failed to direct his mind to the ingredients of the charge and to recognize that there was no evidence whatsoever that the money allegedly given to the appellant was an inducement for forbearing to do an act in relation to his principal's affairs, to wit, to refrain from taking action against the complainant for being in possession of goods alleged to be imitation goods.

It is the prosecution case that on October 25, 1972, at about 4.00 or 5.00 o'clock in the afternoon the appellant in the company of Inspector Zakariah, a fellow officer, proceeded to the complainant's (Wong's) house and after conducting a search, seized certain articles. Wong, who was not at home then, came to know of it from his wife later that evening. Some time after 9.00 p.m. the same evening, Wong called at Cheras Police Station where he met the appellant. At the appellant's suggestion, both the appellant and Wong proceeded to the Lake Gardens in Wong's car. At a tea stall in the Lake Gardens, the complainant asked the appellant why his house was searched and the articles seized. The appellant told Wong that those articles were imitation goods. Wong explained that he was a businessman and when he bought the goods he did not know they were imitation. At this point the appellant asked Wong to wait as he wanted to make a telephone call. Soon after, Inspector Zakariah arrived and joined them. It was then that the appellant asked Wong how much he could give him to solve the matter. The appellant said that at least $2,000 were required. Wong offered $200 he had with him but the appellant did not accept. The appellant told Wong that he would accept $1,500. Inspector Zakariah left after he and the appellant spoke something in English.

After that the appellant got into Wong's car and they had further discussion concerning the amount. After some bargaining the appellant said that he would accept $1,000. Wong told the appellant that he had

to get a loan from his friend. Accompanied by the appellant, Wong proceeded to his friend's house at Ipoh Road. Failing to find his friend there, he then proceeded to Ampang with the appellant still in the car. There he met one Sheon Tan Sang (PW4). After explaining to Sheon why he wanted the money, Wong managed to secure a loan of $100. Sheon who testified at the trial substantiated the evidence given by Wong. Wong again drove to Ipoh Road to look for the friend but was still unable to find him. From there he drove to his house at Salak South. Wong's wife (PW2) had with her $100 and at the request of her husband left the house to borrow $100 from a friend. She got a loan of $100 from one Wong Yew (PW6). Wong then handed a sum of $500 to the appellant. It was almost after midnight that he sent the appellant in his car to Pudu.

According to Wong, the appellant called at the house again many days later. At that time he was in Seremban on business. On his return from Seremban he discussed the matter with his friends. As a result he made a report to the Badan Pencegah Rasuah (i.e. Anti-Corruption Agency, in short "B.P.R."). A trap was laid. Wong was briefed on what he had to do. He was to go to Cheras Police Station and give the appellant the money. After handing the money he was to give a signal by opening the bonnet of his car. Marked notes were handed to him. The notes were dusted with anthracene powder and placed in an envelope. Wong went to Cheras Police Station and there he met the appellant who suggested that they go out to talk. The appellant got into Wong's car and at his request, Wong drove towards Pudu. The appellant, however, changed his mind and asked Wong to go to Circular Road. Arriving at Circular Road/Kampung Pandan traffic lights, Wong told the appellant that he had the balance of money on him. After passing the traffic lights Wong stopped the car by the roadside. He took the envelope containing the money and handed it to the appellant. Pretending that he could not start the car, Wong came out of the car and opened the bonnet to signal that he had passed the money to the appellant. When B.P.R. officers approached the car, the appellant was standing by the side of the car. The marked notes totalling $490 were found near the front wheel of the car at or near the place where the appellant was standing.

The appellant was arrested and taken to the Chemistry Department where he was examined. It is revealed from the evidence given by the chemist that the appellant's hands and trousers bore significant amounts of tiny flourescent specks under ultra violet light. The chemist collected some of the specks from the appellant's right palm and also from the right trouser pocket. The flourescent specks on the appellant's trousers on the right pocket extended into the pocket. On analysis the chemist found the flourescent specks to be anthracene powder.

Apart from the testimony of the officers of the B.P.R. who substantiated the evidence given by Wong in regard to the circumstances that led to the handing of the marked notes and the arrest of the appellant, there was also the testimony of Inspector Zakariah. He testified that he took the appellant in his car on the day in question. It was at appellant's instruction that they searched Wong's house and seized certain articles. The goods were at first kept in his car but later they were sent to the appellant's room at the police mess. According to him, the appellant did not want anyone to know of the raid. No report was lodged and no entries were made in the Station Diary. Inspector Zakariah said that appellant wanted to deal with the matter and he (appellant) even stopped him from informing the O.C. Cheras.

He admitted going to the Lake Gardens at about 9.00 p.m. that same evening after receiving a call from the appellant. At the Lake Gardens he met the appellant and Wong.

Inspector Zakariah did not at first testify but with some reluctance said that just before he left the Lake Gardens, he did hear the appellant asking Wong how much he could afford to give.

I should also state at this point that A.S.P. Shahar Alam bin Haji Abu Kassim a B.P.R. officer searched appellant's room at the police mess and there he recovered most of the articles that were seized from Wong's house.

After hearing the prosecution case, the learned President held that there was conclusive evidence before the court of money changing hands on the two occasions with the seizure of allegedly imitation goods. He also held that the presumption under section 14 of the Prevention of Corruption Act, 1961 operated against the appellant.

The appellant in his defence placed the entire blame on Inspector Zakariah. He denied any involvement in the receipt of the gratifications. Briefly, he stated that on the date in question, Inspector Zakariah asked him to assist in an investigation. He did not know where Inspector Zakariah was going. At Salak South a house was searched and after seizing some articles, the lady of the house was told that her husband was to call at the police station. At about 9.30 that night, Wong came and as Inspector Zakariah was not in and since Wong could give full information on people running a syndicate in imitation goods, he followed Wong in his car to the Lake Gardens and later phoned Inspector Zakariah.

In regard to the sum of $500 alleged to have been obtained by him, he said that what he received was an envelope given by Wong to be handed to Inspector Zakariah. He gave it to Inspector Zakariah without knowing the contents of it. As for the money handed to him by Wong, he said that Wong gave the money to him to be handed to Inspector Zakariah. Explaining the articles that were found in his room, the appellant said that the articles were kept there at the request of Inspector Zakariah and as he seldom saw Inspector Zakariah he forgot about these items.

I shall now turn to the first ground of appeal. Datuk Balwant Singh submitted that there was nowhere stated in the learned President's judgment to show that he made any finding to show that Wong or Inspector Zakariah or any other witness was an accomplice. He further submitted that if a witness was an accomplice, the learned President ought to have warned himself of the danger of convicting the appellant without corroboration.

As for accomplice's evidence I think it is a rule of practice that has the force of law that it is not safe to convict on such evidence unless his evidence is corroborated in material particulars. Nevertheless a trial magistrate may, after careful analysis of the evidence, convict if he is satisfied even without corroboration, of the truth of the testimony given by a witness and such evidence is sufficient to establish the guilt of the accused beyond any reasonable doubt.

It is settled law that the trial magistrate ought in the first instance to determine whether on the facts before him, a witness is an accomplice.

In the instant case although the learned President had not made any finding whether Wong was an accomplice, I do not think it can be seriously argued that, in regard to the first charge, Wong was an accomplice. Faced with the appellant's demand for $1,000 and considering the fact that the appellant had not for a moment left Wong's company until Wong handed part of the amounts solicited, it is quite apparent that Wong had no alternative whatever but to raise the money asked for by the appellant and indeed he handed to the appellant every cent that he managed to raise. Wong had not played any active part in the transaction. He made no offer to bribe the appellant and evidently had no opportunity to report the matter to anyone.

On the basis that this witness is not an accomplice, it is therefore my view that the learned President's failure to warn himself of the danger of convicting on the uncorroborated evidence of an accomplice cannot be said to constitute a valid ground sufficient to quash the conviction. Indeed in the instant case such failure cannot at all be said to occasion any failure of justice.

In any event, I am of the view that each case must be looked at on its own facts. In *Abdul Hamid bin Mohamed* v. *Public Prosecutor*[1] in a case under the Prevention of Corruption Ordinance, 1950, the Appeal Court held that the trial judge was right in his finding that the appellant, a police sergeant, took the initiative by demanding the bribes and it was not the witness who in the first place offered them. The court upheld the trial judge's finding that section 13 of the Prevention of Corruption Ordinance, 1950 applied and that the witnesses were persons who should not be presumed to be unworthy of credit. Section 13 of the Prevention of Corruption Ordinance, 1950 is similar to section 18 of the Prevention of Corruption Act, 1961 which reads —

"18. Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body."

In regard to the handing over to the appellant of the notes marked by the officers of the B.P.R., Wong at the most can be described as a trap witness. In considering the evidence of a trap witness, it is, I agree, desirable that a trial magistrate should warm himself of the danger of acting on the uncorroborated evidence of such witness. Nevertheless in the instant case on review of all the evidence I find that the evidence is so overwhelming that a person judicially trained would be fully satisfied beyond reasonable doubt as to the guilt of the appellant.

As for the second ground, Datuk Balwant Singh cited to me the case of *Loh Kwang Seang* v. *Public Prosecutor*.[2] In that case, the appellant represented to the complainant that because he had taken money to China he (the appellant) could detain him, cancel his citizenship certificate, take his finger prints and change his identity card into a black one. The appellant then told the complainant that since he had been in this country for many years and he had never been in trouble before, if he gave him $150 nothing would happen to him.

In the present case, the appellant never represented to witness that he committed an offence against the law in regard to the articles seized. In *Loh's* case, apart from the representation there was also no prior police action. After making the representation, the appellant threatened the complainant in order to induce the complainant to part with the money. In the present case, there was no threat whatever.

In his capacity as police officer the appellant raided Wong's house and seized certain articles alleged to be imitation. He had already put the police action in motion. At the first available opportunity he solicited for bribes from Wong and he did receive the bribes in return for a favour, namely, to refrain from taking action against Wong for being in possession of goods which were alleged to be imitation.

I shall now turn to the third and fourth grounds. To my mind, they could conveniently be dealt with together.

Datuk Balwant Singh argued that the prosecution had not proved that goods were imitation, meaning that Wong had not committed any offence in respect of which he sought favour from the appellant. In view of section 6(1) of the Prevention of Corruption Act, 1961, it is evident that there was no necessity for the prosecution to prove that the person who gave a bribe had indeed committed any offence. Section 6(1) of the Act reads —

"6. (1) Where in any proceedings against any agent for any offence under paragraph (a) of section 4 it is proved that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification having reason to believe or suspect that such gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to his principal's affairs or business he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity so to do, show or forbear or that he accepted the gratification without intending so to do, show or forbear or that such act, favour or disfavour was not in relation to his principal's affairs or business."

It is pertinent for this purpose to refer to the Singapore case of *Vincent Koh and Another* v. *Public Prosecutor*[3] where Ambrose J. dealing with section 9(1) of the Prevention of Corruption Ordinance, 1960 which is similar to our section 6(1) of the Prevention of Corruption Act, 1961 held that —

"... section 9(1) of the Prevention of Corruption Ordinance, 1960, provides that where in proceedings for an offence under section 6(a) it is proved that an agent had corruptly obtained any gratification having reason to believe or suspect that it was offered as an inducement for showing any favour to any person in relation to his principal's affairs, he will be guilty notwithstanding that such favour was not in relation to his principal's affairs; he shall be guilty notwithstanding that such favour was not in relation to his principal's affairs; ..."

Furthermore section 14 of the Act provides that —

"Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved."

It may be convenient at this point, to refer to the case of *Public Prosecutor* v. *Yuvaraj*[4] where Lord Diplock delivering the judgment of the Board dealing with the presumption of corruption said —

"Where a defendant is charged with an offence under section 4(a) of the Prevention of Corruption Act, 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, viz. (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed 'unless the contrary is proved'."

And speaking of the burden of rebutting the presumption, His Lordship said —

"... upon the true construction of the Evidence Ordinance and the Prevention of Corruption Act 1961, there is, in their Lordships' view, no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question reserved for the consideration of the Federal Court, if the expression in the first part of the question: 'the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable' is understood as meaning 'the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961'."

In the present case the learned President said —

"I rejected the defence is being untrue. I considered whether it could have been reasonably true but in view of the conclusive evidence came to the conclusion that it could not even have been so. I applied the test laid down by Suffian J. (as he then was) in *Mat* v. *Public Prosecutor*."[5]

It would seem to me that after carefully considering the defence, the learned President made a specific finding of fact, namely, that there was no truth in the defence story. In his view, it could not even be reasonably true. In this regard it would suffice for me to say that in the light of the overwhelming evidence which points to the guilt of the appellant, I see no reason at all to disagree with the learned President's finding. Speaking of rebuttal evidence, I would with respect, cite the case of *Attan bin Abdul Gani* v. *Public Prosecutor*[6] where the late Sharma J. had this to say —

"The learned president considered the defence of the appellant. I have given it careful thought and consideration and have asked myself whether it does raise any reasonable doubt in the prosecution case but the only answer I can find is 'No.' I have again asked myself 'Could what the appellant says be reasonably true?' and again I am, on the examination of the evidence, unable to answer that question in the affirmative. . . ."

Earlier on His Lordship said —

"... The presumption cannot be said to have been rebutted without sufficient evidence, i.e. such evidence as is reasonably sufficient to invite belief in its probable truthfulness. It was very strongly urged that as the defence was one of non-receipt of the money there was no onus on the appellant to prove 'the contrary' suggested in section 14. The argument is fallacious because the presumption comes into operation only when the factum of payment is proved as it was to the satisfaction of the learned president in this case. If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary."

In consideration of the whole of the arguments put forward before me and in the light of the evidence shown on record which I have very carefully reviewed, I would not hesitate to say that there is no merit whatever in the appeal against the conviction. The appeal against conviction on both charges is therefore dismissed.

As for the appeal against sentence, the learned President in his judgment said that nothing was said by defence counsel in mitigation. He quite rightly took into account the appellant's position as a police officer but it is also a fact that the appellant will lose his job as a result of the conviction. An imprisonment of two and a half years would in the circumstances of this case be rather excessive. I will therefore allow the appeal against sentence. In so doing, I am not saying that an offence of this nature must be viewed less seriously. All I am saying is that an imprisonment of one year would in the instant case be adequate punishment and in my view sufficiently deterrent to any police officer who would venture to obtain a bribe. I set aside sentence of two and a half years' imprisonment on each charge and substitute therefore one year's imprisonment on each charge with effect from today, sentences to run concurrently.

Order accordingly.

Solicitors: *Datuk Balwant Singh & Co.*

YAP KI SWEE v. PHUA THIAM LAI

[A.C.J. (Syed Othman J.) September 14, 1974]
[Kuantan — Civil Appeal No. 6 of 1972]

Family Law — Maintenance — Failure of husband to comply with maintenance order — Whether wife entitled to apply for an order for husband to be sentenced to imprisonment — Right of husband to be heard — Audi alteram partem — Married Women and Children (Maintenance) Order, 1950, ss. 4 and 10.

The respondent had been ordered to pay maintenance to his wife and children. He defaulted for three months and the appellant applied for an order that the respondent be sentenced to imprisonment for having wilfully neglected to comply with the maintenance order. The learned president of the Sessions Court refused to make the order as he felt that the respondent should be given a chance to pay the arrears and that he should be heard before an order was made to send him to prison. The appellant appealed.

Held, dismissing the appeal: the learned president was right in refusing to issue the commitment warrant merely on the complaint of the wife and without giving the husband an opportunity of being heard.

Case referred to:-

(1) *Laxmi Narain* v. *State* 1959 A.I.R. Allahabad 556.

CIVIL APPEAL.

S. Sivasubramanian for the appellant.

Respondent in person.

Syed Othman J.: The respondent was ordered to pay $350 a month for maintenance of the appellant,